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SUPREME COURT OF THE UNITED STATES
October Term, 1976

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No. 76-340

THE PEOPLE ex rel. JOHN K. VAN DE KAMP,
as District Attorney, etc., et al.,

Petitioners,

PROJECTION ROOM THEATER, et al.,

(and 4 other names)

Respondents

PETITION FOR WRIT OF CERTIORARI

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- B. Whether the California Supreme Court, in conflict in principle with Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), has erroneously concluded that the First and Fourteenth Amendments to the United States Constitution preclude a state from seeking in its pleadings to perpetually enjoin the further operation as a public nuisance of premises which constitute a place of

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- C. Whether the constitutionality per se of the remedies of closure and generic injunction limited to the premises as applied to "adult" motion picture theatres and book stores presents "a federal question of substance" within the meaning of Rule 19(a) of the Rules of this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-

THE PEOPLE ex rel. JOHN K. VAN DE KAMP,
as District Attorney, etc., et al.,

Petitioners,

v.

PROJECTION ROOM THEATER, et al.,

Respondents.

(and 4 other cases)

PETITION FOR WRIT OF CERTIORARI

The petitioner, the People of the State of California,^{1/} respectfully prays that a writ of certiorari issue to review that part of the judgment and opinion of the California Supreme Court entered in this proceeding on June 1, 1976, holding, at the pleading stage herein, that:

1. The full titles of these consolidated cases (including the names of all parties) are as follows:
(Footnote continued.)

(Footnote 1 continued)

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners, v. The Projection Room Theatre, 713 North Western Avenue, Los Angeles, California, Charlotte Reed, Natalie Robin; I.T. Corporation, Willard C. Oppenheim; Howard C. Wirick Jr., Mark Wirick, Respondents, L.A. 30432.

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners, v. Stan's Books, Sam Rabin, Morris Rosen, Pacific Southwest Realty, B & I News, Inc., Sterling J. Colby, Robert Maimor and Alfred Rodney, Respondents, L.A. 30433.

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners, v. Book Bin, etc., Joseph Ingber, Daniel J. Apple, Movie Matic Incorporated, Michael Thevis, Roger Underhill, Joan Thevis, Noel C. Bloom, Phillip Alan Fishman, Peter Lewis and Sherry Bloom, Respondents, L.A. 30434.

Joseph P. Busch, District Attorney of Los Angeles County, Burt Pines, City Attorney, City of Los Angeles, Petitioners, v. Galaxy Book Store, Ahmed Bey, Acme Conveyance Corporation, Margaret Steiner, and Richard Nathan, Respondents, L.A. 30435.

Joseph P. Busch, District Attorney of Los Angeles County, Roger Arnebergh, City Attorney, City of Los Angeles, Raymond J. Byrne, Deputy District Attorney, David M. Schacter, Deputy City Attorney, Petitioners v.
(Footnote continued)

"[E]ven after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene[,] * * * the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution." (People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 59; See Appendix B.)

OPINIONS BELOW

The final June 1, 1976 opinion of the California Supreme Court is so far reported only in the advance sheets at 17 Cal.3d 42

(Footnote 1 continued)

Jasons Adult Books, 1702 North Western Avenue, Hollywood, California, Kaufman Investment Corporation, Lew Kaufman, Violet Kaufman; and Stuart D. Parr, Respondents, L.A. 30436.

(see Appendix B). The original March 4, 1976 opinion of that Court is reported only in the advance sheets at 16 Cal.3d 360 (see Appendix C). The December 27, 1974 opinion of the California Court of Appeal (Second Appellate District, Division 3) is reported only in the advance sheets at 44 Cal.App.3d 111 (see Appendix D). The minute orders of the Superior Court for Los Angeles County (containing a brief statement of reasons for decision) appear as follows: C.T. 11 in the Projection Room Theater, Book Bin, and Stan's Books cases, C.T. 17 in the Galaxy Book Store case (all on June 18, 1973), and C.T. 21 in the Jason's Adult Books cases (on June 28, 1973) (see Appendix E). All of the foregoing opinions appear in the Appendices herein as indicated.

JURISDICTION

The final judgment of the California Supreme Court was entered on June 1, 1976 (see Appendix B) (replacing that previously entered March 4, 1976 [see Appendix C] after respondent's petition for rehearing was denied, June 1, 1976). Included in the June 1, 1976 opinion was a new holding denying to petitioner the remedies of closure and generic injunctions. From this holding Justices Clark and McComb dissented.

Petitioner's timely petition for reconsideration and for modification of the opinion was denied on July 15, 1976 (see Appendix F). This petition for certiorari was filed within 90 days of that date and of the date of the June 1, 1976 judgment.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).^{2/}

2. The California Supreme Court's express holding, foreclosing in advance the forms of relief particularly prayed for, has left petitioner no choice but to seek certiorari now. Otherwise petitioner would be in the strange position of litigating in a trial court operating under a prior restraint (as to remedy), contrary to a litigant's right to have each successive issue decided according to correct principles of law. To permit this case to go to trial without this Court's review at this time would require petitioners to undertake a wasteful second appeal from a trial court judgment decided in accordance with the existing views of the highest state authority, as expressed in the opinion from which we herein seek certiorari. Nor would the question be open at the state appellate level, being precluded by the doctrines of (1) the law of the case (see People v. Shuey, 13 Cal.3d 835, 841; Gyerman v. United States Lines Co., 7 Cal.3d 488, 498) and (2) stare decisis (see People v. Triggs, 8 Cal.3d 884, 891; Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455). Thus, there would appear to be no way for us to urge the preservation of the federal constitutional issue now ripe for decision without defying the California Supreme Court (see Cox Broadcasting (Footnote continued))

(Footnote 2 continued)

Corporation v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029, 1039, 1041 [1975]; North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156, 162-163, 38 L.Ed.2d 379, 384-385, 94 S.Ct. 407, 412 [1973]; Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386, 389, 12 L.Ed.2d 394, 397, 84 S.Ct. 1273, 1276 [1964], n. 4; cf. Miranda v. Arizona, 384 U.S. 436, 498, 16 L.Ed.2d 694, 737, 86 S.Ct. 1602, 1640 [1966], n. 71). A subsequent petition might well be regarded as coming too late (see Rio Grande Western Ry. v. Stringham, 239 U.S. 44, 47, 60 L.Ed. 136, 137-138, 36 S.Ct. 5, 6 [1915]). Finally, the peculiar situation of a foreclosure of particular forms of relief at the pleading stage presents the federal constitutional issue in an unusually clear fashion, unmixed with non-constitutional considerations as to the precise contours of appropriate relief resulting from findings at a later stage and of a less universal interest. Thus the issue as presently posed would appear to be "capable of repetition, yet evading review" (cf. Nebraska Press Association v. Stuart, _____ U.S. _____, 44 U.S. L.W. 5149, 5151 [No. 75-817, June 30, 1976]).

QUESTIONS PRESENTED

- A. Whether the California Supreme Court, in direct conflict with this Court's decision in Art Theater Guild, Inc. et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), and in conflict in principle with other decisions of this Honorable Court, has erroneously concluded that the First and Fourteenth Amendments to the United States Constitution preclude a state from seeking in its pleadings to close for a year premises which constitute a place of lewdness by virtue of continuous exhibition or dissemination of obscene matter.
- B. Whether the California Supreme Court, in conflict in principle with Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), has erroneously concluded that the First and Fourteenth Amendments to the United States Constitution preclude a state from seeking in its pleadings to perpetually enjoin the further operation as a public nuisance of premises which

constitute a place of lewdness by virtue of continuous exhibition or dissemination of obscene matter.

- C. Whether the constitutionality per se of the remedies of closure and generic injunction limited to the premises as applied to "adult" motion picture theatres and book stores presents "a federal question of substance" within the meaning of Rule 19(a) of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth in Appendix A.^{2/} They are: United States Constitution, First Amendment; United States Constitution, Fourteenth Amendment; California Penal Code section 370; California Civil Code, section 3479; California Civil Code, section 3480; California Civil Code, section 3491; California Penal Code, section 311.

3. California Penal Code sections 11230 and 11231 (Red Light Abatement Act) are not included in Appendix A because the California Supreme Court held these sections inapplicable to the facts herein as a matter of state law.

STATEMENT OF THE CASE^{4/}

In these consolidated cases, petitioners who are law enforcement officers acting on behalf of the City and County of Los Angeles, seek injunctive and other relief against respondents who, according to the five separate complaints filed herein, operate book stores or motion picture theaters in Los Angeles which continuously exhibit magazines or films that are obscene^{5/} under the laws of California.

The complaints herein allege the following facts: (1) respondents own or operate specified premises in Los Angeles County in which acts of "lewdness" are taking place, namely, the "past and continuing exhibition" of magazines and films "all of which are lewd and obscene under the laws of this State, and therefore did and do constitute a nuisance under the laws of this state . . ."; (2) the magazines and films so

4. Key to abbreviations used in the text:

AOB - Appellant's Opening Brief
ARB - Appellant's Reply Brief
R.T. - Reporter's Transcript on Appeal
C.T. - Clerk's Transcript on Appeal
(referred to by LA number unless same page applies to all cases)

The "L.A." numbers refer to the designation of these cases by the California Supreme Court.

5. "Obscenity" was defined in terms of the tripartite definition in California Penal Code section 311. (See Appendix A, infra.)

exhibited have, as their dominant theme, an "appeal to the prurient interest in sex," are "patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters," and are "utterly without social value . . ."; and (3) the maintenance of these premises constitutes a public nuisance^{6/} which will continue unless restrained and enjoined. Made a part of the respective complaints were numerous exhibits consisting of police reports summarizing the obscene nature of the magazines and films exhibited by defendants. Included in the prayers (besides preliminary injunctions, abatement of respective premises under California's Red Light Abatement Law, sale of fixtures and movables to pay fees and costs, and other appropriate relief) were (1) a perpetual injunction of respondents, etc., and anyone acting on their behalf from so operating and conducting the respective premises, and (2) a year's closure of the respective premises under the custody and control of the trial court.

6. "Public Nuisance" was defined in terms of California Penal Code section 370 and Civil Code 3479. (See Appendix A, infra.)

Demurrers and Trial Court Ruling

Respondents filed general demurrers to each complaint, asserting that petitioners failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law. The trial court, considering itself bound by the decision in Harmer v. Tonylyn Productions, Inc., 23 Cal. App.3d 941 (1972), sustained the demurrers without leave to amend and entered judgments of dismissal. Petitioners appealed.

Disposition on Appeal

There followed successive reversals by the California Court of Appeal (see Appendix D) and the California Supreme Court (see Appendices B and C). Assuming on appeal the truthfulness of the complaints (including the obscenity of all the films and magazines involved), the latter held that (1) a cause of action had been stated under California's general nuisance statutes (California Penal Code section 370, California Civil Code Section 3479 and 3480), (2) California's Red Light Abatement Law did not apply, (3) injunctive relief could be tailored in equity appropriate to each case, and (4) injunctive relief against specific publications could be constitutionally imposed.

California Supreme Court

Treatment of Issue

(First Opinion)

The California Supreme Court, in its first (subsequently vacated) opinion determined to "express no opinion upon the further question whether the court may, in addition [to enjoining further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing,] either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene." (People ex rel. Busch v. Projection Room Theater, 16 Cal.3d 360, 375; see Appendix C) The Court added that:

"[s]ince the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration." (People ex rel. Busch v. Projection Room Theater, supra, at 376.)

California Supreme Court

Treatment of Issue

(Second Opinion)

Nevertheless, following respondents'

petition for rehearing, the California Supreme Court vacated its first opinion, and substituted another (see Appendix F) which differed from the first only in a segment wherein it held that "the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution." (People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 59; see Appendix B.) This apparently would apply "even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene." (People ex rel. Busch v. Projection Room Theater, supra at 59.)^{7/}

7. Chief Justice Wright, who had dissented on March 4, 1976, now joined the majority, concurring in its June 1, 1976, opinion. Justices Clark and McComb, who had previously concurred entirely, now dissented from the new holding while concurring in the remainder of the opinion. Justice Mosk who
(Footnote Continued)

Thus, by upholding the demurrer as to the particular relief requested in the prayer, the California Supreme Court in essence held that the United States Constitution precludes a state from seeking in its pleadings to close for a year premises which constitute a place of lewdness by virtue of continuous exhibition or dissemination of obscene matter and to enjoin on such premises further activity of the same nature.

Petitioner's Petition For
Reconsideration
Or Modification

Subsequently petitioners filed their petition for reconsideration or modification, contending (1) that the above holding con-

(Footnote 7 Continued)

had previously dissented entirely, now concurred only as to the new holding, continuing his dissent as to the remainder, adding that (unlike the majority) he would hold closure also offensive to Article I, Section 2 of the California Constitution which prohibits action that may "restrain or abridge liberty of speech or press". Their rejection of Justice Mosk's reliance upon the state constitution makes it absolutely clear that the majority relied solely upon the federal constitution (compare California v. Krivda, 409 U.S. 33, 35, 34 L.Ed. 2d 45, 46 (1972), 93 S.Ct. 32; reh. den. 409 U.S. 1068, 34 L.Ed.2d 520, 93 S.Ct. 549 and People v. Krivda, 8 Cal.3d 623, 624.)

flicts with this Court's decision in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), which impliedly upheld closure (with release provisions) where only one obscene film was involved; (2) that the above holding failed to distinguish premises where the "sole emphasis is on the sexually provocative" (cf. Ginzburg v. United States, 383 U.S. 463, 470, 16 L.Ed.2d 31, 37-38, 86 S.Ct. 942, 947 [1966]), as in "adult" or "porno" theaters and bookstores; (3) that the above holding failed to apply "a pragmatic assessment of [the] operation [of the particular type of restraint] in the particular circumstances" (Kingsley Books v. Brown, 354 U.S. 436, 441-442, 1 L.Ed. 2d 1469, 1474, 77 S.Ct. 1325 [1957]) i.e., by considering the effects and limitations of each form of relief in terms of remedial target (purveyor, publication, or premises); and (4) that generic injunctions which, unlike blanket injunctions, incorporate the Miller guidelines and examples, thereby "provid[ing] fair notice to a dealer" of possible prosecution (Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607, 2615 [1973]). On July 15, 1976, the California Supreme Court denied the foregoing petition. (See Appendix G.)

On August 12, 1976, the California Supreme Court denied petitioner's motion to recall the remittitur or stay proceedings in the trial court. (See Appendix H.)

REASONS FOR GRANTING THE WRIT

A

The California Supreme Court, In Direct Conflict With This Court's Decision In Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975) and in Conflict In Principle With Other Decisions of this Honorable Court, Has Erroneously Concluded that the First and Fourteenth Amendments to United States Constitution Preclude a State From Seeking in its Pleadings to Close for a Year Premises Which Constitute a Place of Lewdness by Virtue of Continuous Exhibition or Dissemination of Obscene Matter.

Conflict With And Misconstruction of This Court's Holdings

1) The California Supreme Court, having before it only the pleadings and assuming the truthfulness thereof (including the obscenity of all materials being continuously exhibited on and dis-

seminated from the respective premises [Projection Room Theater, supra, 17 Cal.3d at 48-49]), held "that to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." (Id. at 58.)

Thus, in essence, California's Court of last resort has held that the federal constitution precludes a state from ever seeking the closure remedy, "even after it has been repeatedly determined that all or substantially all of the magazines or films exhibited or sold therein are obscene" (Projection Room Theater, supra, 17 Cal.3d at 59, compare, id. at 48-9 [quoting pleadings and assuming truth thereof]).

Nevertheless, the above holding of the California Supreme Court appears to be in direct conflict with this Court's decision in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975) wherein this Honorable Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in State ex rel. Ewing v. "Without A Stitch",

(Ohio, 1974) 307 N.E.2d 911, thereby ruling on the merits (see Hicks v. Miranda, ____ U.S. ____, 45 L.Ed.2d 223, 95 S.Ct. 2281, 2289 [1975]) that an order closing a theater which exhibited a single obscene motion picture film for a period of one year was constitutionally valid, at least where the owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he will prevent the nuisance from being reestablished (i.e., the exhibition of the particular film declared obscene). (See, "Without A Stitch", supra, 307 N.E. at 917-918 and U.S. Supreme Court's comment on that case in Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 [1975], at 43 L.Ed.2d 496-497, n. 23 and the last two sentences of text preceding that footnote). Therefore, there is nothing that would constitutionally prevent at least this much abatement relief in the instant case.

2) However, we are not dealing here with the exhibition of a single obscene motion picture film (as in "Without A Stitch")^{8/} but with the continual exhibi-

8. The same film was involved in Harmer v. Tonylyn Productions, Inc., 23 Cal.App.3d 941, (Footnote Continued)

tion of obscene films (R.T. in Projection Room Theater case, p. 2, lines 30-32) on premises which hold themselves out to the public as specializing in "Adult Films" (R.T. in Projection Room Theater case, pp. 188:5, 200 [incorporated into complaint at id. 4:18-26]).^{9/} If "[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication" (Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607, n. 7 [1973]), it would seem that premises which specialize in obscene films would similarly not be redeemed by an occasional non-obscene film. "Where [as here] the purveyor's sole emphasis is on the sexually provocative aspects of his publication[s] that fact may be decisive in the determination of obscenity" (Ginzburg v. United States, 383 U.S. 463, 470, 16 L.Ed.2d 31, 37-38, 86 S.Ct. 942, 947 [1966]; see also

(Footnote 8 Continued)
distinguished in People ex rel. Hicks v. Sarong Gals, 27 Cal.App.3d 46, 50 (from the standpoint of the Red Light Abatement Law) on the ground that "It cannot be presumed from a single incident that the place will continue to be used to present the obscene material."

9. Affidavits incorporated into the complaint describe the films in detail.

Memoirs v. Massachusetts, 383 U.S. 413, 420, 86 S.Ct. 975, 978 [1966]; United States v. Rebhuhn, 109 F.2d 512 (cert.den. 60 S.Ct. 974; discussed in Ginzburg, 383 U.S. at 472-473) and other cases cited in Ginzburg at n. 14 (383 U.S. at 472). An "adult" or "porno" theater or bookstore is one where the sole emphasis is on the sexually provocative aspects of the films or magazines therein (whatever other qualities such materials may possess in insulation). Thus, closure of such premises cannot possibly infringe upon any substantial First Amendment interest (any protected qualities of the "communication" therein being necessarily ultra vires).

3) Thus, "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. 'What is needed', . . . 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis'" (Kingsley Books v. Brown, 354 U.S. 436, 441-442, 1 L.Ed.2d 1469, 1474, 77 S.Ct. 1325 [1957]).

The California Supreme Court's talismanic indication that closure of a

"theatre" or "bookstore" would necessarily constitute an impermissible prior restraint (Projection Room Theater, supra, 17 Cal.3d at 58-59) must yield to a more particularistic analysis: (1) as to the nature of the nuisance (here premises specializing in sexual provocation) and (2) as to the nature of the remedy (aimed at the particular premises rather than at the publication or purveyor [see A.R.B. 10-15 for more extensive discussion]). We have already discussed, supra, (1) the nature of the nuisance (not an ordinary theater, but a comparatively recent phenomenon, a modern vicarious counterpart to the old-fashioned "house of ill repute" [see A.O.B. p. 8:10-19; pp. 15-16]). As to (2) the nature of the closure remedy, it should be noted (a) that it leaves the purveyors free to disseminate their publications on other premises (People ex rel. Hicks v. Sarong Gals, 42 Cal.App.3d 556, 563)^{10/} while rendering the subject premises

10. Compare the effects of license denial or incarceration (on the purveyor) or administrative censorship or injunction (on the publication) (see A.R.B. 10-15 for more extensive discussion). It would appear that remedies directed against the premises are not per se more "drastic" or "chilling" than those directed against the purveyor or (Footnote Continued)

unavailable to any use (protected or otherwise); and (b) that the sanctions (including closure) are imposed because of past exhibitions (i.e., the nuisance) and not because of what may or may not be shown in the future (i.e., particular films, etc.). (Cf. 106 Forsyth Corp. v. Bishop, 362 F.Supp. 1389, 1396-1397 [M.D. Ga., 1972].) Thus, "a pragmatic assessment" of the operation of closure in the instant case compels the conclusion that it is not an invalid prior restraint.

4) With the Kingsley Books requirements in mind, we proceed to examine decisions of this Court cited by the California Supreme Court in support of its proposition that closure of a "theater" or "bookstore" necessarily constitutes an impermissible prior restraint. It should be remembered that we are merely at the demurrer stage herein and that the exact bounds of relief appropriate herein have yet to be described by the trial court. This factor alone dis-

(Footnote 10 Continued)

his publication. Therefore, "[i]t is not for this court thus to limit the State in resorting to various weapons in the armory of the law." (Kingsley Books v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 [1957].)

tinguishes post-judgment cases which, unlike the California Supreme Court herein were not imposing or precluding a state from ever seeking the closure remedy in its pleadings.

Cited in support of the California Supreme Court's "prior restraint" ruling were the following decisions of this Court: "Near v. Minnesota (1931) 283 U.S. 697, 711-715, 720; Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70-71; Freedman v. Maryland, supra, 380 U.S. 51, 57; Carroll v. President and Commissioners of Princess Anne (1968) 393 U.S. 175, 180-181; see and compare Kingsley Books, Inc. v. Brown, supra, 354 U.S. 436." (Projection Room Theater, supra, 17 Cal.3d at 58.) None of these decisions invalidated closure or generic injunctions limited to the premises, but rather dealt with restraints against publications. Therefore, they are clearly inapposite here.

5) Despite the California Supreme Court's curious implication that it was unaware of authority adverse to its conclusion, (People ex rel. Busch v. Projection Room Theater, supra, 17 Cal.3d at 59), Justice Clark's concurring and dissenting opinion quotes a passage from

that Court's original opinion, citing six cases which "suggest that such further forms of relief would be appropriate and constitutionally permissible. [Citations.]" (Id. at 62-63, Clark, J., dissenting, quoting from vacated opinion, 16 Cal.3d at 375-376.)^{12/}

B

The California Supreme Court, In Conflict In Principle With Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), Has Erroneously Concluded That The First and Fourteenth Amendments to the United States Constitution Preclude a State from Seeking in its Pleadings to Perpetually Enjoin the Further Operation as a Public Nuisance of Premises Which Constitute a Place of Lewdness By Virtue of Continuous Exhibition or Dissemination of Obscene Matter.

12. Among cases cited to that court by petitioner was Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975). (See our Answer to Petition for Rehearing filed March 29, 1976, p. 10, lines 5-7, also citing Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, 1212 [1975], at n. 23 and related portion of text.)

The California Supreme Court held that "the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution." (Projection Room Theater, supra, 17 Cal.3d at 59.)

Thus, in essence, California's Court of last resort has held that the federal Constitution precludes a state from ever seeking the remedy of a generic injunction against further operation of the premises as a nuisance (even where continuously exhibiting or disseminating obscenity).

Although not expressly stated, the defect no doubt seen in "blanket injunctions" of obscenity is that they do not define what is obscene so as to give fair notice of what constitutes a violation (cf. Mitchem v. State ex rel. Schaub (Fla., 1971) 250 So.2d 883, 886). Although this objection might have weight as to injunctions merely worded in terms of "obscenity" (without expressly incorporating any definition thereof), it would seem no longer viable as to generic injunctions phrased in terms of the two

examples given in Miller v. California, supra, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607 (1973). So worded, such injunctions "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution [or, a fortiori, civil relief]" (id. at 413 U.S. 27, 37 L.Ed.2d 432-433). Nor need the purveyor fear unless he contemptuously deals in patently offensive "hard core" obscenity, (the only matter unprotected by the First Amendment). (Miller, supra, 413 U.S. at 27, 37 L.Ed.2d at 432.)

Based on the Miller guidelines, Justice Maddox, concurring in General Corp. v. State ex rel. Sweeton, (Ala. 1975), 320 So.2d 668, 675 (cert. den. Sweeton v. General Corp., ___ U.S. ___, 18 Cr.L. 4206, No. 75-1011 [plurality opinion below]) drew the logical conclusion:

"The only constitutional problem I see in this case is the prior restraint inherent in the injunctive relief granted, but I believe relief could be tailored which would regulate illegal conduct, protect First Amendment rights, and would permit the operation of the business to show films which were not obscene.

In short, the trial judge had voluminous evidence before him that the Fox Cinema Theatre was being used for an illegal activity. Faced with this overwhelming evidence of a pattern and practice of illegal conduct, and having determined the obscenity vel non of the films which were shown there, the trial court could have enjoined the further use of the theatre to show films which were '(a) Patently offensive representations or descriptions of ultimate sexual acts; normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'

"Under Miller, I believe the trial judge, under authority of Alabama's Red Light Abatement Act could permanently enjoin the use of the theatre for showing obscene films and could require anyone desiring to use the theatre for a legitimate purpose to submit a plan which would show the purpose for which the theatre would be used and the trial court could determine promptly whether the proposed use was for a legitimate purpose, using the Miller standard, of course."

(Compare the similar release provisions of State ex rel Ewing v. "Without a Stitch" [Ohio, 1974] 307 N.E.2d 911, upheld by this Court in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 [1975].)

Far from casting "an appalling chill upon the exercise of freedom of expression in this state" as respondent claimed in his petition for rehearing in the California Supreme Court (at p. 13, lines 11-13), injunctive remedies with proper constitutional safeguards (such as the prior adversary

hearing required here [Projection Room Theater, supra, 17 Cal.3d at 59-60] or the plan envisioned by Justice Maddox in General Corp. v. Sweeton, 320 So.2d 668) "provide[] an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation" (Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55, 37 L.Ed.2d 446, 455, 93 S.Ct. 2628, as quoted below in Projection Room Theater, supra, 17 Cal.3d at 55), notice far better than would precede an ordinary criminal action with threat of incarceration. (See dissenting opinion of Justice Douglas in Miller v. California, supra, 413 U.S. at 41-43, 37 L.Ed.2d at 441-442, 93 S.Ct. 2607 (1973), (wherein he recommends that administrative censorship precede any criminal prosecution; see also California Supreme Court's opinion in Zeitlin v. Arnebergh, 59 Cal.2d 901, 905-907).)

Ignoring the foregoing constitutional principles established by this Court, the California Supreme Court has preferred a talismanic approach resulting in a blanket prior restraint on the trial court.

C.

The Constitutionality Per Se of the Remedies of Closure and Generic Injunction Limited to the Premises As Applied to "Adult" Motion Picture Theaters and Bookstores Presents "A Federal Question of Substance" Within the Meaning of Rule 19(a) of the Rules of this Court.

It is clear that "a federal question of substance" is involved here (see Rule 19 (a), Rules of the Supreme Court of the United States). As this Court stated in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60, 37 L.Ed.2d 446, 458, 93 S.Ct. 2628, n.10 (1973), "'we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.'" [Citation.]"

Not only has this Court "often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and uncon-

senting adults" (Id. at 413 U.S. 57, 37 L.Ed. 2d 456), it has also held that "there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby." (Id. at 413 U.S. 57, 37 L.Ed.2d 457 [footnote omitted])

As this Court has recognized "[r]ights and interests 'other than those of the advocates are involved.' [Citations.] These include the interest of the public in the [quality] of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." (Id. at 413 U.S. 58, 37 L.Ed.2d 457.)

In addition, the appearance "of societal approval" created by the unencumbered proliferation of porno specialty houses (denominated "adult") is "'another potent influence on the developing ego'" (Ginsberg v. New York, 390 U.S. 629, 642, 20 L.Ed.2d 195, 205-206, 88 S.Ct. 1274, n. 10; compare Paris Adult Theatre I, supra, 413 U.S. 58, 37 L.Ed.2d 457, 93 S.Ct. 2628, n. 7).

Turning to the issue of remedy, this Court has been careful to state (with particular regard to state efforts "to protect its people against the dissemination

of pornography"),

"It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. [Citations]" (Kingsley Books v. Brown, 354 U.S. 435, 441, 1 L.Ed.2d 1469, 1474, 77 S.Ct. 1325 [1975].)

Foreclosing in advance (as necessarily unconstitutional) the forms of relief particularly requested in the complaint (a year's closure of premises and a perpetual injunction against further operation thereof as a nuisance), the California Supreme Court concluded that abatement "must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (Projection Room Theater, 17 Cal.3d 42, 59.)

Thus, the People are relegated to a

piecemeal approach of litigating each item one at a time (cf. Kingsley Books v. Brown, supra, 354 U.S. at 440, 1 L.Ed.2d at 1473), an approach which cannot be successful against premises which specialize in obscenity but constantly turn over their stock, substituting new (assembly line) titles for old (and new issues of monthly porno magazines for old). This is especially true in the case of "adult" or "porno" movie theaters which normally would only show a particular film for a limited period of time, even though (as assumed herein by the court below) all the films that are shown there are obscene. By the time the prior adversary hearing is concluded as to old magazines or films, said old magazines or films will have been replaced by new (unlitigated) ones. Of course, with each change of purveyor, even titles once found obscene in other hands will have to be relitigated (see McKinney v. Alabama, ____ U.S. ____, 44 U.S.L.W. 4330 [No. 74-532, March 23, 1976]).

Thus, with the rise of a new form of the traditional house of ill fame (adult bookstores and movie theaters), the California Supreme Court has concluded that it is constitutionally compelled to remove from the armory of the law those weapons focused on

the premises (closure and related generic injunctions). The result is a unilateral disarmament which cannot preserve the right to a decent society from "the tide of commercial obscenity" (see Paris Adult Theatre I, supra, 413 U.S. at 57, 37 L.Ed. 2d at 457, 93 S.Ct. at 2635).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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